United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2290

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—against—

EDMUND ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR HEARING EN BANC

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Introduction

On April 23, 1975, a panel of this Court decided United States v. Seijo & Hildebrandt (Nos.644,681, Sept. Term 1974). Six days later, another panel of this Court decided United States v. Rosner (No.523, Sept. Term, 1974). These decisions are--as appellant will demonstrate--absolutely irreconcilable in every relevant way. Appellant is confident that if the government is asked to present its views, it will agree that these two decisions simply cannot stand together. Although the Rosner panel discussed Seijo in a footnote, it candidly acknowledgedthat it learned of the case "after agreement on this opinion (Rosner)by our panel". While not explicitly finding the case distinguishable, the Rosner panel did catalogue several "points" of alleged distinction. None of these points withstand analysis.

On Tuesday, May 6, 1975, Counsel for Rosner telephoned the Honorable Andrew Frey, Deputy Solicitor General of the United States, and formally requested that the Solicitor General's office make a determination whether Rosner and Seijo can be reconciled. Later that day, Assistant United States Attorney John Gordon filed an affidavit in this court indicating that Frey had instructed him to request an additional thirty days to determine whether to seek rehearing or rehearing en banc in Seijo. Accordingly, appellant respectfully requests this court to consider the Rosner petition together with Seijo; to grant the Rosner petition for rehearing en banc and--if it also grants rehearing in Seijo--to set the cases down for argument together. If the government decides against petitioning for rehearing in Seijo, or if the court decides against granting rehearing in that case, appellant nonetheless respectively requests rehearing by his panel or by the court en banc.

II. The Governing Standard For Rehearing En Banc

Federal Rule App.Proc 35(a) provides in pertinent part,

> "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions..."

See Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247, 270 (1952)(Frankfurter,J. concurring). That inconsistent contemporaneous decisions within a circuit are incompatible with proper judicial administration has been repeatedly reaffirmed.

> "...desirable judicial administration commands consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals." Wisniewski v. U.S., 353 U.S. 901, 902(1956); Moody v. Albermarle Paper Co., 94 S.Ct. 2513,2516 (1974)

The Second Circuit has confirmed the principles announced by the Supreme Court on this point. Fitzgerald v. U.S. Lines Co., 306 F.2d 461,463(1962) Additionally, it has emphasized that an important criterion for rehearing is whether "the case involves an issue likely to affect many other cases." Watters V. Moore-McCormack Lines, In. 312 F.2d 893,894(1963). Under these standards, as appellant will demonstrate, Rosner presents a paradigmatic case for rehearing.

III. The Conflict Between Seijo and Rosner

The legal issue raised in both cases is identical: must a new trial be granted where it is discovered after trial that a key government witness testified falsely regarding the extent of his criminal past; and where the government possessed information before trial that contradicted that testimony. The facts in both cases are similar as well; and to the extent that they differ, every single difference--as appellant will demonstrate--militates

more in favor of reversal in Rosner's case. Nonetheless the Seijo panel ordered a new trial, whereas the Rosner panel did not.

a. The Nature of Leuci's Perjury Was Far More Egregious Than Was Torres'.

There is no question that Leuci committed perjury on the witness stand: The District Court so found (Slip Opinion at 2,4); the panel so affirmed (Rosner at 3254) and the government has so conceded. In contrast, the government, far from conceding Torres' "perjury", argued vigorously that his testimony was not properly deemed perjurious. Government brief in Seijo Appeal at p.14 note 19-20. The Seijo panel meticulously avoided using the label "perjury" to characterize Torres' testimony.

But regardless of the label, Leuci's concealment was far more extensive and serious than was Torres'. Torres failed to inform the jury of one single instance in which he had been convicted of the victimless crime of possession of marijuana in North Carolina five years before the Seijo trial; Torres had received a suspended sentence, probation and a fine of $300.00. Leuci, by conservative estimates, deliberately concealed the following:

> "On fifteen occasions Leuci shared money seized in arrests. He conducted several illegal searches and engaged in illegal electronic serveillance. He distributed small quantities of heroin to his informants for their personal use. He accepted money and narcotics from informants in return for allowing them to continue dealing. He sold information from police investigations to those being investigated. He participated in bribes. He accepted money from attorneys and on one occasion helped to bribe an Assistant District Attorney."* Rosner at 3265

* By Leuci's own testimony during the hearing on Rosner's new trial motion, his crimes were too numerous to account. He admitted that he had engaged in crimes daily for a period of several years while ostensibly working as a New York City police officer. Nor could he remember the exact amount of illegal profits he earned, but estimates ran from $92,900.00 to $234,800.00.

Moreover the degree of deviation between what Torres admitted and what he denied is trivial when compared to the grossness of Leuci's lies. The Seijo panel recognized that Torres

> admitted that he had used opium, that he had been addicted to and had sold heroin; that at the time of the trial he was taking methadone. The import of past possession of marijuana pales in comparison with Torres' extensive involvement with 'hard' drugs." Seijo at 3051-3052. (Emphasis added)

In sharp contrast, Leuci's admission to "complicity in corrupt dealings on four separate occasions with criminal defendants or subjects of investigation" is a joke compared to the hundreds upon hundreds of deadly serious crimes concealed by Leuci.

The Seijo panel recognizing that neither the crime concealed by Torres, nor the degree of his falsehood were in themselves terribly shocking, nonetheless concluded that Torres' false denial of his prior conviction "cannot be said to constitute merely cumulative impeaching material." Seijo at 3052. (emphasis added)*

The Rosner panel, faced with far more egregious "admitted perjury" concerning massive preditory criminality, nonetheless labeled Leuci's newly discovered perjury as "solely of an impeaching nature". Rosner at 3247,3253,3266,3269.

b. The Degree of Governmental Involvement in Improper Suppression Was Far Greater in Rosner Than In Seijo.

In Seijo, there was no evidence of deliberate suppression of evidence by the government. The record is clear that at the time

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* The panel explained its holding thus:

"...it is persuasive that his false and conscious concealment of the prior conviction renders the uncorroborated substance of his testimony suspect. Perhaps the North Carolina conviction, had it been disclosed at the trial, would not have seriously damaged Torres' credibility. However, his false concealment of any criminal record in his adult life generates doubt concerning the rest of the evidence he delivered against the appellants." Seijo at 3052.

of trial absolutely "no member of the'prosecutorial team', nor any other Assistant United States Attorney connected with the case knew of Torres' prior conviction...Furthermore trial counsel for the Government had no reason to disbelieve Torres' statement before trial that he had no previous conviction." GB Seijo, p.17. Significantly, when the existence of the FBI sheet came to the attention of one of the government lawyers involved in the case, he immediately made its substance known--even though the trial was over and the case already on appeal.* The panel thus held the suppression to be the result of neglect, rather than prosecutorial misconduct." Seijo at 3053. Indeed, one of the defendants whose conviction was reversed in Seijo apparently conced in his brief that there was no basis for any claim of prosecutorial misconduct. (Government brief at p.17 citing Hildebrandt brief at p.5)**

In Rosner, the District Court found that long before the trial the government came into possession of two hard pieces of evidence establishing Leuci's involvement in certain types of crimes--which he later falsely denied on the witness stand. One was the Goe

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*Thus the Seijo panel concluded:

"We are not confronted with any intentional suppression on the part of the Government, of evidence favorable to the defendant. Indeed, the record indicates the Assistant United States Attorney, responsible for the prosecution, made known the falsity of Torres' testimony as soon as it was communicated to him." Seijo at p. 3051.

**It is difficult to comprehend what the Rosner panel means when it says that Seijo was a case where "the government was at fault in not discovering the past criminal record, a situation which concedely did not exist in the Rosner case." (fn. 8, emphasis added). Not only did counsel not concede that in Rosner; he spent twenty pages of his brief vigorously arguing that the government was at fault. There is not the slightest basis in the record for the conclusion that this was in any way conceded.

Memorandum, a report written by a DEA agent just two weeks before Rosner filed pre-trial discovery motions, which records an admission by Leuci of his participation in a burglary-larceny arising during an illegal search. Rosner at 3250. The other was a tape recording of a conversation between Leuci and an informant named Lawrence in March, 1971, in which the two discussed procedures for the illegal procurement of narcotics, and Leuci suggests to Lawrence that he obtain "packages" of heroin during arrest situations. See Rosner at 3249. Additionally, two Assistant U.S. Attorneys had long term personal awareness of the admissions contained in these two items. Edward Shaw had learned about the incident described in the Goe Memorandum in early 1971; Nicholas Scoppetta had listened to the Leuci-Lawrence tape in Spring 1971, and he had later deposited it in a "locked closet" in the United States Attorney's Office. Regarding the role of these two lawyers in the Rosner trial, the District Judge found:

> "...both Shaw and Scoppetta were deeply involved in the preparation of the Rosner case. The two men were given primary responsibility for gathering and disclosing to the defense all '3500 material'. Shaw also presented the case to the grand jury and, although by the time of trial he had left the United States Attorney's office to become head of the Southern District's Strike Force, he was the government's first witness and by his own admission followed the trial closely." District Court Slip Opinion, pp.9-10.

Thus in exact contrast to Seijo, the record in Rosner is unequivocally clear that lawyers on the "prosecutorial team" were specifically aware of information which contradicted Leuci's trial testimony. Indeed, the trial judge found that Shaw's and Scoppetta's knowledge was such that "the prosecution can be held responsible for knowledge...

of the Goe Memorandum and the Lawrence tape." District Court Slip Opinion, p.15. The failure of Shaw and Scoppetta to disclose the information they had about Leuci's additional crimes is particularly indefensible in light of the persistent demands by Rosner's defense attorneys for precisely this sort of information--demands of which Shaw and Scoppetta were personally aware. While the defense in Seijo made only a general request for prior records of government witnesses, the District Court found that the Rosner defense attorneys made persistent and repeated requests for specific evidence and information concerning Leuci's past crimes, especially drug-related crimes. Nor can Leuci's own knowledge of his perjurious testimony be entirely overlooked in evaluating the government misconduct, for Leuci too was "part of the prosecution". Rosner at 3265.

Perhaps the most striking contrast between the two cases lies in the government's post-trial tactics. Within a few weeks after trial, Leuci's registered "reliable" informant, Richard Lawrence, told the United States Attorney's office that Leuci had lied at the trial regarding his own involvement with narcotics crimes. As the Rosner panel found:

> "Although Rosner's first motion for a new trial was pending before the court and was based on the contention that Leuci had sold drugs to several deponents and had lied about his criminal past at trial, the prosecutor failed to make Lawrence's allegations available to the defense. Judge Bauman denied appellant's first motion.
>
> "We think the United States Attorney's Office erred seriously in failing to notify the defense about the Lawrence situation. Appellant is right that the prosecutor should not have made a unilateral determination of the credibility of Lawrence when what Lawrence was alleging fitted into the very pattern of conduct suggested by appellant's motion." [Emphasis added] Rosner at 3269.

One year after that first new trial motion the defense learned about Lawrence on its own. When the defense then called Lawrence to the attention of the government the government continued to suppress the Leuci-Lawrence tape and the Goe Memorandum. Indeed, the tape "only came to light during the final days of the new trial hearing when Leuci made an inadvertent reference to it". Rosner at 3249. (Emphasis added). Assistant United States Attorney Elliot Sagor learned of the Goe Memorandum and that it had been suppressed pre-trial-- on April 8, 1974. According to Leuci's testimony, Sagor was extremely agitated when he discovered this; a high level conference was called, including the United States Attorney himself. Yet, the defense was not informed until the last week in June, on the eve of the new trial hearing. During the interim, the United States Supreme Court considered--and denied--Rosner's application for certiorari. That Court never was informed that the government had possessed pre-trial information contradicting Leuci's trial testimony; indeed, the opposite was clearly implied.

c. The Usefulness To The Defense Of The "Added Item" Would Have Been Far Greater In Rosner's Case Than In Seijo.

In Seijo, the usefulness of disclosure of the FBI record sheet would have been limited to a traditional attack on Torres' credibility: the disclosure would have demonstrated that his denial of a prior record was false, and the prior record itself could have been considered as evidence bearing on trustworthiness.

In Rosner, the usefulness of these added items to the defense would not have been limited merely to an attack on Leuci's credibility; they would have led to the discovery of Lawrence himself, which would have enabled the defense to crack Leuci's criminal past wide open at the time of trial.*

The government conceded, during the course of the trial, that disclosure to the jury of information abour Leuci's corrupt past would be "derogatory of the Government's case"(Trial Tr.1468) especially in light of its argument to the jury that "not once, not once did Det. Leuci get caught in any lie, he didn't lie" Trial Tr.1333. There can be no serious question that had Leuci been "caught in a lie"--in a lie of enormous proportion-- and had revelation of his sordid and despicable past occurred before the very eyes of the jury, the defendant's fate may well have been differently decided." See Seijo at 3054.

Moreover, in Rosner, unlike Seijo, the unrevealed crimes bore directly on Leuci's motive to lie or to fabricate a case in order to "curry favor" with the government. It is precisely because Leuci was an unprosecuted criminal that it was essential for him to remain in the special protective graces of the government. Leuci needed insurance against the day when his past might catch up with him; although "he did not expect to be prosecuted" for the four sales of information (Rosner at 3246), he surely could not feel confident that he would not be prosecuted for the hundreds of serious

* Leuci began to admit his true criminal past to the authorities shortly after Rosner filed motion papers setting forth Lawrence's allegations that Leuci had engaged in extensive narcotics dealings.

crimes he had committed over the years. In any event, Leuci's vulnerability for the four sales of information was trivial when compared with his vulnerability for his vast numbers of undisclosed crimes. Why else would Leuci have so carefully and persistently kept his true past hidden from the government? Testifying for the government Leuci may well have been attempting to ensure that if and when his past became known, the government would prevent his prosecution.

d. The Unsubstantiated Portions Of Leuci's Testimony Are At Least As Critical As Those of Torres'.

In attempting to distinguish between Seijo and Rosner, the Rosner panel focuses on an assessment that "the essence of the government's case against both [Seijo] appellants resides in the testimony of Leonard Torres". Rosner, 3273, note 8. But in Seijo the government's case did not depend entirely on Torres' testimony. Indeed, Torres did not even testify before the grand jury, and there was ample evidence apart from his testimony from which the jury could have found the defendants guilty.* GB Seijo at 14,note. Indeed in holding that disclosure of Torres' untruthfulness "could" have affected the jury's result, the panel did not suggest that all of Torres' testimony would have been impeached, but merely that disclosure "would have exerted a compelling impact on his credibility as to the unsubstantiated aspect of his testimony." Seijo at 3053 (emphasis added)

In Rosner the unsubstantiated portions of Leuci's testimony were far more critical that those in Seijo. Rosner's entire defense of entrapment rested squarely on his version of what transpired at two unrecorded meetings--a version specifically contradicted by Leuci's wholly uncorroborated testimony.

* The evidence apart from Torres' testimony includes a statement made by one of the co-defendants to a detective in which he admitted narcotics involvement and revealed his source of supply of heroin; surveillance of the defendants participating with Torres in meetings connected to the delivery of narcotics; and discovery of a package of heroin under the car seat where one of the defendants was seated after his arrest. See GB/Seijo at 25-26.

Again, in striking contrast to Seijo where Torres did not even testify before the grand jury, in Rosner Leuci was the government's main witness before the grand jury; indeed, the tapes themselves--which the Rosner panel said was the "linchpin of the government's case"--were not even played before the grand jury. Clearly then the government deemed Leuci himself a far more critical witness in Rosner than it deemed Torres in Seijo.

e. The Different Standards Employed

The difference in result between Seijo and Rosner is plainly not explainable on the basis of the factual difference between the two cases.* Rather, it must rest squarely on the difference in the standard applied by the two panels: In Seijo the panel measured the new trial motion by the standard set forth by the United States Supreme Court in Giglio v. U.S., 405 U.S.150(1972) and by this Circuit in U.S. v. Miller, 411 F.2d 825(1969), and its progeny:

> "... when the reliability of a particular witness may be determinative of innocence or guilt, a 'new trial is required if the false testimony could--in any reasonable likelihood have affected the judgment of the jury....'
> "Where, as here, there was neglect, rather than prosecutorial misconduct, a higher standard of materiality is required. In this posture, the test--'is whether there was a significant chance that this added item, developed by skilled counsel...could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' Seijo at 3053.

Carefully applying the elements of the Miller test, the Seijo panel ordered a new trial on the ground that:

> "Had the jury known that Torres responded untruthfully, the exposure could have created a sufficient doubt in the minds of enough jurors to affect the result." Seijo at 3054
> continued on next page at fn.**

* Nor can it be justified on the ground that Rosner admitted the elements of his offense and relied exclusively on the defense of entrapment. If this was the distinction relied on by the Rosner panel, there would be a direct conflict between the Rosner panel and the panel which reversed Yagid's conviction in the recent case of United States v. Badalamente, 507 F.2d 12 (2d Cir.1974)

In Rosner, the panel initially claimed to be relying on the very same cases and test, but when it came to deciding the case, the panel shifted to a different--and wholly unprecendented--standard.

> "The question presented, then, is whether there is a significant chance that skilled counsel could have developed the evidence of Leuci's criminality contained in the Leuci-Lawrence tape and the Goe Memorandum to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt. We emphasize that the standard demands more than the possibility of a different result upon retrial... An Appellate court must weigh whether or not there is in reality a 'significant chance' that the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction." Rosner at 3252. (Emphasis added).

In concluding that Rosner was not entitled to a new trial, the panel specifically relied on this new formulation of the test:

> "In view of the evidence therein presented, it strikes us as highly unlikely that the shift in the trial equation produced by two additional pieces of impeachment information, one very minor and one ambigious, aimed at a witness whose character was already tarred, would have been sufficient to change the result. We conclude that these items, no matter how skillfully used by defense counsel, would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped." Rosner at 3263. (Emphasis added).

This shift carries with it a subtle yet significant change in the burden of proof on a new trial motion. Under the Miller-Seijo test, a defendant must prove merely that there was an "added item" favorable to the defense which the government possessed pre-trial but failed to disclose and that the defense could have made some non-frivolous use of the item which could have affected the jury's deliberation. The

** The panel amplified its holding: "Had the source and subject of Torres' untruthfulness on direct examination been disclosed and developed at the trial, the appellants' fate may well have been differently decided. Although the true answer to the precise question must remain unknown, enough is established in the record presented to demonstrate that the material withheld sufficiently touches upon the constitutionally protected rights of the appellants and impairs the validity of the verdicts returned against them." Seijo at 3054. (Emphasis added).

burden then shifts to the government to prove that no matter how skillfully developed by defense counsel, the added item could not have induced even one single juror to entertain a reasonable doubt.*

The "would" test applied in Rosner makes it far more difficult for a defendant to obtain a new trial when there has been prosecutorial suppression. The test virtually forcloses a new trial unless the defendant can prove to the satisfaction of a majority of the Court that the "added items" would change the verdict. The burden never shifts to the government; it remains on the defendant to persuade the court that the added item would induce a reasonable doubt.

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* Under the Miller test, the appellate court must evaluate whether or not there is a realistic reasonable possibility that a juror's judgment could be affected; but the members of the court may not substitute their own judgment as to whether they, if jurors, would be persuaded by the "added item" to entertain a reasonable doubt; nor may they refuse to grant a new trial because they are "convinced of the correctness of the jury's verdict." See U.S. v. Miller, 411 F.2d, supra at 832.

The court in Miller reached its conclusion that a new trial was warranted despite the "considered belief of the able and conscientious district judge, who [had] lived with this case for years, that review of the record in light of all the defense new trial motions left him 'convinced of the correctness of the jury's verdict'. U.S. v. Miller, 411 F2d, supra at 832

CONCLUSION

Negligent governmental suppression is probably the most frequently recurring criminal law problem in this Circuit as evidenced by perusal of the relevant West Digest entries for the Districts within this circuit. The decisions reached by the Seijo and Rosner panels are in irreconcilable conflict on this issue. Accordingly, appellant respectfully requests that this Court grant appellant's motion for rehearing or rehearing en banc.

Respectfully submitted,

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